



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 23, 2003

Mr. Ronald D. Stutes
Attorney at Law
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2003-2729

Dear Mr. Stutes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179855.

The Town of Flower Mound (the "town"), which you represent, received a request for all police dispatch and phone logs for a specified time period, audio dispatch over police radio for a certain date, a specified "audio-video tape," police policy and procedure handbook, racial profiling policy, and all offense and arrest reports and probable cause affidavits for a named individual. You advise that you have released some of the requested information, but you do not indicate that you have released the requested "audio dispatch" or "audio-video tape," nor does your request for a decision address this information. Thus, if you have not released this information, you must do so at this time to the extent that it exists. *See* Gov't Code §§ 552.021, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information, some of which consists of representative samples.¹

As section 552.103 is the most inclusive exception you raise, we address it first. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

¹ We assume that the "sample" of records submitted to this office is truly representative of those requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body that has litigation interest).

You claim that the submitted information is related to a pending criminal prosecution and should, therefore, be excepted from disclosure under section 552.103. You do not inform us, however, that the town is a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under such circumstances, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. You have failed to provide this office with an affirmative representation from the prosecuting entity that it wants the submitted information withheld from public disclosure. Thus, the submitted information may not be withheld under section 552.103 of the Government Code.

We note, however, that a portion of the submitted information is governed by chapter 261 of the Family Code. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," which includes information made confidential by other statutes. Section 261.201 of the Family Code reads in part as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for

purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

We find that the information we have marked constitutes a report used or developed in an investigation made under chapter 261 of the Family Code. You have not cited any specific rule that the town has adopted with regard to the release of this type of information, and we are not aware of any such rule. Thus, we assume that no such regulation exists. Given that assumption, the marked report is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). Accordingly, you must not release this report to the requestor.

We next address your claim under section 552.108 of the Government Code. Section 552.108(a)(1) states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body that raises section 552.108 must sufficiently explain, if the responsive information does not provide an explanation on its face, how and why section 552.108 is applicable to the information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You inform us that the requested offense and arrest reports and probable cause affidavit pertain to a case in which prosecution on a criminal charge is pending and that release of the information would therefore interfere with the prosecution of the crime involved. Based on your representations, we conclude that the release of this information "would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 at 3 (1978).

However, section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. In Open Records Decision No. 127 (1976), this office summarized the types of information made public pursuant to *Houston Chronicle*. *See* Open Records Decision No. 127 at 3-4 (1976). The town must release the types of information that are considered to be front page offense or arrest report information, even if this information is not actually located on the front page of an offense

or arrest report. Thus, with the exception of basic information, the town may withhold the information at issue based on section 552.108(a)(1).

You also claim that some information contained in the submitted dispatch logs is excepted under the common-law informer's privilege. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute or law. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You indicate that information you have marked pursuant to section 552.101 constitutes information identifying individuals who have reported alleged violations of criminal law, and you reference specific provisions of the Penal Code alleged to have been violated. You advise that the town's police department has the authority to enforce the Penal Code. Based on your representations and our review of the submitted information, we agree that the town may withhold most of the information it has marked under section 552.101 in conjunction with the informer's privilege, because it is information that reveals the identities of informers. The information we have marked for release may not be withheld pursuant to the informer's privilege because it does not reveal an informer's identity.

You further claim that some information is confidential under section 58.007 of the Family Code. Section 552.101 also encompasses confidentiality provisions such as section 58.007. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

The submitted documents include a small amount of information identifying an individual involved in juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, this information is confidential pursuant to section 58.007(c) of the Family Code. We agree that you must withhold the information you have marked pursuant to section 58.007 from disclosure under section 552.101 of the Government Code.

Finally, we address your claim under section 552.130 for the remaining information. Section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Thus, we agree that you must withhold a Texas driver's license number, and most Texas license plate and vehicle identification numbers. However, pursuant to section 552.023, the requestor has a special right of access to his own information that is normally protected under section 552.130. *See* Gov't Code § 552.023 (person or person's authorized representative has a special right of access to information that is protected by laws intended to protect person's privacy). Therefore, you may not withhold the license plate or vehicle identification number of the requestor's vehicle contained within the submitted information under section 552.130.

In summary, you must withhold the information we have marked pursuant to section 552.101 in conjunction with section 261.201 of the Family Code. You may withhold the submitted offense and arrest reports and probable cause affidavit under section 552.108, with the exception of basic information. You may withhold the information you have marked under section 552.101 in conjunction with the informer's privilege, with the exception of the information we have marked for release. You must withhold the information under section 552.101 that is confidential under section 58.007 of the Family Code, and you must withhold the Texas motor vehicle information pertaining to individuals other than the requestor under section 552.130. The remaining requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 179855

Enc. Submitted documents

c: Mr. Antonio Jones
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(w/o enclosures)